No. 15-606

In the Supreme Court of the United States

MIGUEL ANGEL PEÑA-RODRIGUEZ,
Petitioner,

v.

STATE OF COLORADO,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Colorado

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The "no-impeachment rule," often codified as Rule of Evidence 606(b), prohibits admission of juror testimony to impeach a verdict. In *Tanner v. United States* and *Warger v. Shauers*, the Court held that the no-impeachment rule is consistent with the Sixth Amendment even when it bars evidence that jurors engaged in serious misconduct during trial or expressed bias against one of the parties. The question presented is as follows:

Under *Tanner* and *Warger*, does the Sixth Amendment compel an exception to no-impeachment rules to address allegations that racially biased statements were made during jury deliberations?

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BRIEF FOR RESPONDENT

Respondent, State of Colorado, respectfully requests that the Court affirm the judgment of the Colorado Supreme Court.

RELEVANT EVIDENTIARY RULES

Colorado Rule of Evidence 606(b) provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Federal Rule of Evidence 606(b) provides:

> **(b) During an Inquiry into the Validity of a Verdict or Indictment.**
>
> (1) *Prohibited Testimony or Other Evidence.* During an inquiry into the

validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions*. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

INTRODUCTION

No one disputes that racial bias is reprehensible and has no place in the jury room. The question here is whether one particular method of addressing racial bias among jurors—post-verdict inquiry into jury deliberations—is constitutionally compelled despite wide acceptance of the no-impeachment rule.

For over a century, the Court has declined to grant exceptions to the no-impeachment rule in the face of serious juror misconduct or bias that violated the Sixth Amendment. In *McDonald v. Pless*, the Court adhered to the no-impeachment rule despite evidence that a verdict was handed down only after "protesting jurors finally yielded" to other jurors' insistence that they ignore the governing law. 238 U.S. 264, 265–66 (1915). In *Tanner v. United States*, a majority of jurors drank alcohol or used drugs during trial and several slept through afternoon proceedings. This clearly violated the defendants' Sixth Amendment rights, but the Court again declined to make an exception to the no-impeachment rule. 483 U.S. 107, 126–27 (1987). Finally, in *Warger v. Shauers*, a car-accident case, a juror revealed during deliberations that her daughter had been involved in a car accident—something the juror had failed to mention during voir dire. The juror was convinced that if her daughter had been sued for the accident "it would have ruined her life." 135 S. Ct. 521, 524 (2014). Although this juror "would have been struck from the jury" had she disclosed her bias during voir dire, the Court once again refused to create an exception to the no-impeachment rule. *Id.* at 530.

In deciding these cases, the Court recognized that our jury system is committed to fairness and includes

numerous safeguards against jury misconduct or bias, making post-verdict invasion of jury deliberations unnecessary. The Court also recognized that, in the context of these safeguards, no-impeachment rules serve interests vital to the jury system. Those same considerations govern this case, despite agreement on all sides that the juror's statements here were highly improper

STATEMENT OF THE CASE

1. ***Factual Background.*** The crimes occurred in the women's bathroom of a barn at a horse racing track. The three victims—sisters aged 14, 15, and 16—lived at one end of the barn with their parents and other siblings. Their father was a jockey. A handful of others also lived in the barn: the Millers, who trained horses, and two horse keepers. One of the horse keepers was a man named Hugo; another was Petitioner, who had lived at the barn for around a week. R. Tr. 4–7, 15, 84, 98, 142–43, 150 (Feb. 24, 2010).

One evening after dark, the girls went to the women's bathroom to take showers. They were in the bathroom for around fifteen minutes when a Hispanic man walked in. All three girls recognized him. The 15-year-old and 16-year-old had seen him talking and drinking beer with Hugo just before they entered the bathroom. The 14-year-old had seen him with Hugo earlier that day. R. Tr. 12–15, 50, 62, 85–87, 103–04, 141 (Feb. 24, 2010).

The man asked the girls if they wanted to "drink or party." They said no. The 15-year-old immediately returned to their family's living area, leaving the other

two girls with the stranger. The 16-year-old twice told the man to get out of the bathroom, but the man asked the girls their names and "came really close" to the 14-year-old. The man then moved toward the door. Rather than leave, however, he turned out the lights. This scared the girls; the 14-year-old demanded that he turn the lights back on. R. Tr. 15, 18, 39, 87, 107–09 (Feb. 24, 2010); R. People's Ex. 1, Env. 1, p. 3.

In the dark, the man groped the two girls. He pulled the 16-year-old so that they were chest to chest, moved his hand down her lower back, and grabbed her buttocks. He put his hand on the 14-year-old's shoulder and moved it toward her breast, but she was able to push him away. "He didn't grab [her breast] or anything"; he was "moving his hand down" when the 14-year-old "grabbed it off" of her. R. Tr. 18–19, 126, 214–15 (Feb. 24, 2010).

The girls fled the bathroom and ran to where their family was staying. They told their parents what had happened and described the man who assaulted them, explaining that they had seen him earlier with Hugo and that he was the man "at the other end of the barn." The only people staying at the other end of the barn aside from Petitioner were the Millers and Hugo, whom the girls knew Based on the girls' description, their father knew that the man was Petitioner. R. Tr. 20, 139–40, 143, 154–55 (Feb. 24, 2010).

The father ran to find Petitioner but was unable to, instead reporting the incident to a security guard. While he spoke to the guard, he saw Petitioner speed away in a pickup truck. The guard called the police. R. Tr. 144–48 (Feb. 24, 2010).

Based on information the girls and their father provided, the police found Petitioner in his truck and arrested him. Although Petitioner denied seeing the girls that evening, he conceded that they had seen each other earlier that day. The police separately drove the 14-year-old and 16-year-old to Petitioner so they could identify him, each viewing Petitioner from within a patrol car at a distance of about ten to fifteen feet. The area where Petitioner was being held was "very well" lit; in addition to parking lot lighting, it was illuminated with spotlights and overhead lights from three patrol cars. R. Tr. 171, 173, 181–83, 185–86, 210–11 (Feb. 24, 2010).

Each of the girls independently identified Petitioner as the man who had harassed them in the bathroom. They had "no doubt" it was him; they recognized him "immediately" and were "100% positive that he was the same man who did it." R. Tr. 23, 111–14, 187–88 (Feb. 24, 2010); R. People's Exs. 11 & 12, Env. 3, pp. 3, 5.

2. ***Jury Selection.*** Petitioner was tried for four crimes: one felony count of attempted sexual assault on a child under the age of 15 (for his conduct toward the 14-year-old), one misdemeanor count of unlawful sexual contact (for his conduct toward the 16-year-old), and two misdemeanor counts of harassment (for his behavior toward both girls). J.A. 10–11; R. Court File Vol. I, p. 17 [1]

Jury selection consumed nearly the first full day of the three-day trial. Before being assembled for

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[1] Petitioner was also charged with driving under the influence, but that charge was dismissed before trial. J.A. 10; Pet. App. 3a.

questioning, members of the venire had completed questionnaires asking for basic information and whether, given the subject matter of the case, they could be fair. In their responses, some venire members admitted harboring biases. One questionnaire stated that the responding venire member was "prejudice[d] at times." Another stated that the venire member had "no tolerance." These questionnaires were given to counsel for both parties before voir dire began. R. Seal., Jury Questionnaires, Juror Nos. 20, 36, pp. 80, 83.

Before bringing the venire members into the courtroom, the presiding judge noted to counsel that "in the past, some of our jurors have been vocal in their dislike of people who aren't in the country legally" and stated that defense counsel could address that issue in voir dire. Within the jurisdiction, defense counsel routinely question the venire regarding jurors' attitudes towards race, ethnicity, or nationality. J.A. 16, 131–32.

Once the venire members were seated in court, the judge explained the voir dire process, admonishing venire members to "listen closely to all the questions" and "answer fully all questions asked by the attorneys or by me." Consistent with Colorado Rule of Criminal Procedure 24(c), counsel for both the People and Petitioner had the right to engage in voir dire questioning. J.A. 16–19.

The judge opened voir dire by asking some basic questions in open court. But the judge also asked sensitive questions about child sex assault, instructing the venire members not to answer publicly and not to raise their hands. Instead, the judge invited venire members to "wait outside the door" so that the bailiff

could "bring you in one at a time" and allow the judge and counsel to "hear from you privately." A dozen venire members did so, raising a range of concerns including traumatic personal or family histories of rape or sexual assault and general feelings of bias. Ten were excused for cause. J.A. 19–23; R. Tr. 52–54, 56–78 (Feb. 23, 2010, morning).

Counsel then conducted their own voir dire examinations. Consistent with Colorado practice, the court allowed counsel freedom during voir dire. The judge did not object to any line of questioning by either party J.A. 23–35; R. Tr. 80–118 (Feb. 23, 2010, morning).

The prosecutor's examination was lengthy, consuming 39 pages of the transcript. Defense counsel followed with questioning of his own. But he explained to the venire that his questioning would not "take very much time"; it consumed only 14 pages of the transcript. He asked no questions about race, ethnicity, or nationality generally. He also asked no questions regarding racial, ethnic, or nationality bias. J.A. 23–35; R. Tr. 80–118 (Feb. 23, 2010, morning).

After counsel together used a total of eleven peremptory strikes, and after the court confirmed neither party "ha[d] a Batson challenge," the jury was seated. J.A. 36; R. Tr. 138–44 (Feb. 23, 2010, morning).

3. ***Trial, Jury Deliberations, and Verdicts***. The prosecution called as witnesses the three sisters, their father, and three sheriff's deputies who had investigated the crimes. The defense called only an alibi witness, who was a legal resident of the United States but had traveled from Mexico to give testimony.

He claimed he was a worker at the racetrack at the time of the crimes and that Petitioner, his friend, had been with him in a stable when the crimes occurred. After this testimony, the defense rested, the court read instructions to the jury, and both sides gave closing statements. R. Tr. 2 (Feb. 24, 2010); R. Tr. 13–14, 16–17, 20–21, 36–37, 40, 49 (Feb. 25, 2010).

The jury began deliberations and continued for the rest of the day. The next day, two hours into their resumed deliberations, they sent a note to the judge saying, "This Jury is Hung Judge." The court gave Colorado's version of an *Allen* instruction[2] and the jury resumed deliberations. That afternoon, the court reported to counsel that the jurors had gotten "very loud for a while," that the court "had to quiet them down," and that afterwards the jury sent a note saying they had reached verdicts on three counts but were unable to reach a verdict on the fourth. The court, after polling the jury to determine whether further deliberations would be fruitful, declared a mistrial on the deadlocked count and received the verdicts. J.A. 2, 67–70; R. Tr. 82 (Feb. 25, 2010); R. Court File Vol. 1 at 182.

The jury found Petitioner guilty of all three misdemeanor charges: one count of unlawful sexual contact as to the 16-year-old, based on that girl's description of Petitioner having pulled her chest-to-chest and grabbed her buttocks, and two counts of harassment, based on his "touch[ing the girls] or subject[ing them] to physical contact." The jury was unable to reach a verdict on the felony count,

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[2] *Allen v. United States*, 164 U.S. 492, 501 (1896).

attempted sexual assault on a child. This charge required proof, beyond a reasonable doubt, that Petitioner took a "substantial step" toward knowingly "touching [the 14-year-old's] intimate parts." She testified, however, that although Petitioner touched her shoulder, he had not grabbed her breast.[3] J.A. 59–62, 71; R. Tr. 126, 214–15 (Feb. 24, 2010).

4. ***Post-Trial Proceedings.*** After the verdicts were rendered and the jury was dismissed, defense counsel spoke with the jurors. Two of them alleged that another juror had made racially biased statements during deliberations. *See* J.A. 77, 83, 109–10.

The court gave defense counsel permission to receive the jurors' contact information and to obtain their affidavits. In doing so, the court concluded that Colorado's no-impeachment rule, codified as Rule of Evidence 606(b), did not allow inquiry into the jurors' internal thought processes or "the actual effect of juror bias" on deliberations.[4] Under state law, the rule allowed the court to consider the proffered affidavits for only one reason: to explore whether any juror had "deliberately misrepresented important information" in

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[3] The evidence on this count had always been less conclusive than the evidence on the other counts. The count was originally charged as consummated sexual assault, but it was bound over after the preliminary hearing as a count for attempt only. Pet. App. 3a.

[4] The biased statements also were not "extraneous prejudicial information" or "outside influence[s]" under the express exceptions set forth in Rule 606(b)(1) and (2). *See* Pet. App. 9a.

response to voir dire questioning.[5] The court noted that both parties had been given ample opportunity to question the venire about potential biases, and any "juror who expressed any hesitation ... was subject, not only [to] the Court's further inquiry, but to inquiry by counsel." J.A. 84, 89–90, 92, 96–98, 108–10.[6]

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[5] A few years after the trial court's ruling below, this Court interpreted Federal Rule 606(b) to apply even when juror testimony is sought to prove that a juror lied in voir dire. *Warger*, 135 S. Ct. at 528. But Colorado continues to admit juror testimony for that purpose under its own version of Rule 606(b). *Black v. Waterman*, 83 P.3d 1130, 1137 (Colo. App. 2003); *see also* 27 WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE § 6074, pp. 515–17 (2d ed. 2007).

[6] The district court's management of the post-trial proceedings was careful and thorough. After Petitioner moved for disclosure of jury contact information, the trial court ordered defense counsel to provide details regarding the post-verdict conversation with the jurors. J.A. 72–75. Petitioner filed a second motion for disclosure of jury contact information, accompanied by an affidavit from defense counsel. J.A. 76–79, 83. The judge ordered that defense counsel supplement the motion to identify the jurors' gender, allowing the court to minimize the number of jurors whose contact information would be disclosed. J.A. 96–98. The court instructed defense counsel to personally contact the jurors, rather than delegating the task to an investigator, and to obtain affidavits concerning what was said during deliberations. J.A. 96–98. After receiving the affidavits, the court allowed multiple rounds of briefing, held several hearings, and issued a number of orders to address Petitioner's motion for a new trial. *See* J.A. 150.

According to the affidavits, a juror named H.C. made various offensive remarks:

- he thought Petitioner "did it because he's Mexican and Mexican men take whatever they want";
- he said "Mexican men [are] physically controlling of women";
- he said he was a former law enforcement officer and "where he used to patrol, nine times out of ten Mexican men were guilty of being aggressive toward women and young girls";
- "he did not think the alibi witness was credible because, among other things, he was 'an illegal.'"

J.A. 109–10.

The trial court received briefs from the parties regarding the relevance of these allegations and reviewed a transcript of voir dire. At a hearing, the trial court noted that during voir dire, defense counsel had not asked a single question regarding potential racial, ethnic, or nationality bias. This surprised the judge, who explained that "those questions are always asked." The judge observed that, had defense counsel "asked [a] question in voir dire about Mexican-Americans or people of Hispanic [descent]," H.C. might have "been a strike for cause." "But [H.C.] wasn't asked that question ...." Instead, the questions defense counsel posed were abstract and general: "only, 'Are you being fair?'" J.A. 124, 131–32.

Based on this record, the court determined that H.C. could be called into court for questioning, but defense counsel could not seek testimony regarding his alleged racial bias. Instead, counsel could ask H.C. only about another topic: why he had not disclosed his law enforcement background when asked during voir dire, "Are you or any member of your family or any close acquaintance a law enforcement officer?" J.A. 122, 125, 127

Juror H.C. was subpoenaed and placed under oath at a hearing. He explained that he had been in law enforcement "forty years ago, in the late '60s" and did not believe he was asked during voir dire about his past employment history. Instead, he understood the question to be directed only at "friends or relatives currently." J.A. 145–47.

Petitioner moved for a new trial based on the two juror affidavits and H.C.'s testimony. Due to H.C's "confusion regarding the nature of the question and the length of time since he had been a law enforcement officer," the court concluded that Juror H.C.'s failure to disclose his past law enforcement experience was inadvertent. The court denied the motion for a new trial. J.A. 150, 157–160.

5. ***Appellate Proceedings.*** The Colorado Court of Appeals affirmed. In rejecting Petitioner's as-applied Sixth Amendment challenge to Rule 606(b), the court concluded that Petitioner's failure to conduct voir dire on the topic of racial bias waived his objections. According to the court, "a defendant cannot claim his rights were violated when an opportunity existed to protect those rights but his counsel failed to do so for tactical reasons." Pet. App. 50a, 56a, 64a.

One judge dissented; he would have held that the Sixth Amendment compels an exception to Rule 606(b) only for "bias against distinct racial groups." The dissenter did not address whether further exceptions would be required for biases based on "gender, religion, sexual orientation, or immigration status." Pet. App. 65a, 84a & n.7

The Colorado Supreme Court also affirmed but did not base its ruling on waiver. Pet. App. 11a n.5. Instead, after analyzing *Tanner* and *Warger*, the court held that application of Rule 606(b) did not violate Petitioner's Sixth Amendment right to an impartial jury. The court reasoned that, "[c]ombined, *Tanner* and *Warger* stand for a simple but crucial principle: Protecting the secrecy of jury deliberations is of paramount importance in our justice system." The court identified the vital interests served by no-impeachment rules, including protecting the finality of verdicts, ensuring full and frank jury deliberations, promoting the jury's independence, and preserving public confidence in the jury system. It explained that creating exceptions to the rule based on "different *types* of juror bias or misconduct" would be "arbitrary," given that the Sixth Amendment itself does not draw such lines. Finally, it reasoned that the safeguards this Court relied upon in *Tanner* and *Warger* "protect a party's constitutional right to an impartial jury." Thus, carving a racial-bias exception from the no-impeachment rule "would ignore both the policy underlying [Rule] 606(b) and the unwavering Supreme Court precedent emphasizing the magnitude of that policy." Pet. App. 11a n.5, 13a–16a.

Three justices dissented. They would have carved out an exception to Rule 606(b), but only for "evidence of racial or ethnic bias." Pet. App. 17a, 25a. The dissenters were skeptical that any procedural safeguard except post-verdict examination of jurors would detect and correct racial bias. And although they acknowledged that "[t]he policies of finality and juror privacy that underlie [Rule] 606(b) are well founded," they believed that an exception to the rule would not undermine those policies. Pet. App. 17a, 25a–26a.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The Court's decisions in *Tanner* and *Warger* are dispositive of this case.

I. *Tanner* and *Warger* identified four procedural safeguards that assure the integrity of the jury system. Those safeguards effectively detect and address racial bias among individual jurors. In addition, three other important trial procedures counteract the potential for racial bias on juries.

A. The first *Tanner* safeguard is voir dire, a critical part of trial. During voir dire, judges and attorneys use a number of techniques to extensively probe jurors regarding their potential biases, including biases involving personal and sensitive topics. Racial attitudes are among them. The case law demonstrates that voir dire on racial bias is effective; indeed, this Court has constitutionally mandated voir dire on racial bias in certain cases. Conducting voir dire on that topic also amounts to sound trial strategy, particularly in cases involving interracial sex assault. And voir dire is widely available to probe racial attitudes. In Colorado,

for example, defense counsel have the legal right to question prospective jurors about racial prejudice.

B. The other three safeguards identified in *Tanner* and *Warger* are likewise effective. Jurors are willing and able to report the improper racial comments of fellow jurors and have done so in many past cases. Nonjuror evidence is also available, particularly in the age of social media. Finally, courthouse staff constantly interact with jurors, providing opportunities to observe jury members and overhear biased remarks.

C. In addition to the *Tanner* safeguards, three other trial procedures counteract racial bias on juries. First is the fair-cross-section requirement of the Sixth Amendment, which guarantees that jury wheels include each distinctive demographic group that exists within the defendant's community. This emphasizes to the public and to jurors the democratic nature of the jury system and contributes to the overall impartiality of the jury. Colorado is especially committed to the fair-cross-section requirement, prohibiting jury selection practices that cause even de minimis differences between the makeup of jury pools and the overall population. Second is *Batson v. Kentucky*, which guarantees that voir dire serves the purpose it was meant to serve—selecting jurors based on their ability to fairly evaluate the evidence. Third, jury size and unanimity requirements enhance the deliberative process and ensure that verdicts are based on the evidence and the law rather than one juror's improper considerations.

II. In the context of these safeguards, the no-impeachment rule serves interests vital to the jury system.

A. No impeachment rules serve five vital government interests.

First, as the Court held in *Tanner* and *Warger*, an exception to the no-impeachment rule would expose jurors to post-verdict examination regarding their internal deliberations and thereby inhibit full and frank discussion in the jury room. This Court's precedent reflects concern that post-verdict examination of jurors will not only inhibit discussion of improper topics but will dampen full and frank discussion overall. Petitioner's proposed exception may also have the effect of driving racial bias underground, where it can neither be confronted nor corrected by fellow jurors or the court.

Second, exceptions to the no-impeachment rule undermine the finality of jury verdicts, potentially delaying final resolution of a case for months or years. Given that Petitioner's proposed exception for racial bias would apply nationwide in both the criminal and civil context, and would likely be expanded to other biases and juror misconduct, the threat to verdict finality is substantial.

Third, exceptions to the no-impeachment rule exacerbate incentives to harass jurors. *Warger* rejected the argument that the interest in preventing juror harassment is minimal merely because jurors may voluntarily disclose information about their deliberations and because ethical rules govern interactions between counsel and jurors.

Fourth, public confidence in the jury system would suffer if profoundly disturbing juror misconduct, like that at issue in *Tanner*, were insulated from scrutiny, while other misconduct triggered an exception to the no-impeachment rule.

Finally, the no-impeachment rule has long fostered jury independence. Retrying a jury's verdict post-trial undermines the centrality of the lay jury, rather than the professional judge, to the criminal justice system.

B. In crafting their no-impeachment rules, jurisdictions like Colorado have carefully balanced the policies animating them. Petitioner's proposed exception would undermine those policy judgments. It would require Colorado and the federal system to draw lines among different types of biases, leading to unfair outcomes among defendants with substantial Sixth Amendment claims that fall outside Petitioner's rule.

ARGUMENT

Because "state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," state evidentiary rules withstand constitutional challenge unless they "serve no legitimate purpose or ... are disproportionate to the ends that they are asserted to promote." *Holmes v. South Carolina*, 547 U.S. 319, 324, 326 (2006) (quotation marks and alteration omitted). In *Tanner* and *Warger*, this Court rejected Sixth Amendment challenges to the no-impeachment rule, holding that several mechanisms within the trial process protect a defendant's right to an impartial jury and, in the context of those safeguards, the rule serves

interests crucial to the jury system. That same analysis applies here.

Petitioner's attempt to distinguish *Tanner* and *Warger* amounts to an attack on the reasoning of those decisions and the principles underlying them. But the basis of those decisions remains sound and applies equally in the circumstances of this case.

I. Safeguards throughout the trial process effectively address the potential for racial bias among prospective and sitting jurors.

The legal system has developed safeguards against juror bias that operate without intruding into the jury's internal deliberations. In *Tanner* and *Warger*, this Court held that because a defendant's "Sixth Amendment interests ... are protected by several aspects of the trial process," constitutional exceptions to no-impeachment rules for juror competency and juror bias are unwarranted. *Tanner*, 483 U.S. at 127 These safeguards need not be effective in every case. *Warger*, 135 S. Ct. at 529 ("Even if [voir dire fails to detect a particular form of bias] juror impartiality is adequately assured by [other safeguards]."). The safeguards work in combination to adequately protect the right to a fair trial. Even in "cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged," the question is "whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* at 529 n.3.

Petitioner's case depends on his establishing that, without a post-verdict inquiry into internal jury deliberations on questions of racial bias, defendants will have "no meaningful opportunity to vindicate the

right to an impartial jury." Pet. Br. at 19, 21. This is not true. The safeguards that led this Court in *Tanner* and *Warger* to uphold the no-impeachment rule in the face of serious misconduct and bias apply equally to this case. And beyond the safeguards this Court relied on in *Tanner* and *Warger*, additional protections within the trial process vindicate the right to an impartial jury.

A. Voir dire is a proven and sometimes constitutionally compelled safeguard against the racial bias of potential jurors.

Voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). Indeed, less than two years ago this Court affirmed that voir dire "can be an essential means of protecting this right." *Warger*, 135 S. Ct. at 528–29. Bringing the defendant "face to face, in the presence of the court, with each proposed juror," and giving him "an opportunity ... for ... inspection and examination ... is required for the due administration of justice" and is "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408–09 (1894).

Given its critical importance, "[t]he voir dire in American trials tends to be extensive and probing." *Swain v. Alabama*, 380 U.S. 202, 218–19 (1965). "Every experienced trial lawyer knows that the ritualistic global inquiry to the entire panel by the trial judge is only the beginning in sensitive cases. The questioning that goes *beyond* this opening ritual is the essence of voir dire." *United States v. Greer*, 968 F.2d 433, 443

(5th Cir. 1992) (en banc) (opinion of Higginbotham, J.). Most States use some combination of judge and attorney questioning and, often, questioning is done both "en masse" and juror-by-juror. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.3(a), pp. 100–01 & n.45 (4th ed. 2015). This questioning often delves into sensitive topics. *Id.* p. 92. But "[c]ourts routinely assure prospective jurors through a variety of methods that their private information need not be disclosed to the public." *State v. Strode*, 217 P.3d 310, 320 (Wash. 2009). For example, juror questionnaires, distributed before oral questioning of the venire, "give explicit assurances of confidentiality." *Id.* And judges "commonly allow jurors to approach the bench and discuss sensitive matters there" or conduct "in chambers discussions." 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.3(a), p. 92.

Here, voir dire consumed nearly the first full day of a trial that lasted only three. The jurors answered written questions, were examined in open court by the judge and counsel for both parties, and were invited to raise sensitive issues in private. The judge granted counsel significant freedom during voir dire, never objecting to any questions asked by counsel for either party. Yet defense counsel decided not to "take very much time" with voir dire and declined to ask any questions at all about race, ethnicity, or nationality. J.A. 16, 23–35, 131–32.

Petitioner asserts that "there [was] no reason for defense counsel to think race should be an issue at trial at all" and that it was not a "relevant consideration." Pet. Br. 24, 26. The record refutes this assertion: this case presented allegations of an interracial sexual

assault against children; two jurors disclosed in questionnaires that they were "prejudice[d] at times" or had "no tolerance"; the judge warned defense counsel of jurors' potential bias against undocumented immigrants; and voir dire on racial bias is common in the jurisdiction. J.A. 16, 131–32; R. Seal., Jury Questionnaires, Juror Nos. 20, 36, pp. 80, 83. Indeed, this Court has acknowledged that cases involving interracial crimes—such as the interracial sex assault here—are among those in which racial prejudice is likely to be a factor for biased jurors. *See Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (plurality opinion) (requiring voir dire on racial bias because "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence"); *see also Commonwealth v. Hobbs*, 434 N.E.2d 633, 641 (Mass. 1982) (mandating voir dire on racial bias in all trials involving interracial sexual offenses against children).

Dismissing the record and the case law, Petitioner demotes voir dire from one of the Sixth Amendment's most important constitutional safeguards to a procedural bump in the road through trial. He argues that (1) voir dire is ineffective at discovering racial bias, (2) inquiring into venire members' racial attitudes amounts to poor trial strategy, and (3) voir dire is subject to too much judicial control to be a reliable safeguard. Pet. Br. 24–28. He is incorrect on all three counts.

1. ***Effectiveness***. Voir dire on racial bias is not only effective; sometimes it is constitutionally compelled. *Turner*, 476 U.S. at 36–37 (requiring voir dire "on the issue of racial bias" in interracial capital

cases); *Ham v. South Carolina*, 409 U.S. 524, 525–28 (1973) (requiring courts to grant voir dire on racial bias when "essential fairness" demands it). And even when it is not required by the Constitution, "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." *Ristaino v. Ross*, 424 U.S. 589, 597 n.9 (1976). The Court has thus committed to use its "supervisory power" over federal courts to require voir dire on racial bias at a defendant's request. *Id.* at 597 n.9, 598 n.10.

This Court's conclusion that voir dire on racial bias is an appropriate exercise of judicial discretion and is mandatory in cases involving some interracial crimes cannot be squared with Petitioner's assertion that voir dire on racial bias is ineffective or counterproductive. Pet. Br. 25–26. Voir dire on racial bias is constitutionally required precisely because it is effective. *See Turner*, 476 U.S. at 36 (plurality opinion) (emphasizing "the ease with which [the] risk [of racial bias] could have been minimized" through voir dire). Court decisions repeatedly demonstrate its effectiveness.[7]

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[7] *See, e.g., Brewer v. Marshall*, 119 F.3d 993, 995–96 (1st Cir. 1997) (after the court conducted "an individual voir dire on racial and ethnic bias ... against black persons or persons of Hispanic origin .... one juror had been excused due to racial bias"); *United States v. Hasting*, 739 F.2d 1269, 1271 (7th Cir. 1984) (after the court's "specific reference to racial prejudice" one woman "indicated that the race of the participants of the trial would affect her verdict"); *United States v. Barnes*, 604 F.2d 121, 136 (2d Cir. 1979) (several prospective jurors "admitted some prejudice against blacks" and were excused); *Kelly v. Hendricks*, No. 03-2536, 2005 WL 2897499, at *6 (D.N.J. Oct. 31, 2005) (holding that a state trial court's

Despite this case law, Petitioner argues that jurors will not disclose racial prejudice because it "is generally met with social condemnation" and is "embarrassing to publicly acknowledge." Pet. Br. 27. But this ignores that, as part of the voir dire process—which is conducted under penalty of perjury and the threat of contempt—"potential jurors are often asked sensitive and potentially embarrassing questions." *Greer*, 968 F.2d at 443 (en banc) (opinion of Higginbotham, J.). Petitioner's argument also ignores that voir dire may be conducted to encourage candid responses even when it probes delicate topics.

For example, counsel can request that questions about racial bias be included in juror questionnaires, the answers to which are confidential and not shared with the rest of the venire. *See People v. Harlan*, 8 P.3d 448, 500 (Colo. 2000) ("The trial court took precautions at the outset of the trial to foreclose the injection of improper racial considerations by including questions concerning racial issues in the jury questionnaire."); *State v. Long*, 575 A.2d 435, 469 (N.J. 1990) (Handler, J., concurring in part and dissenting in part) (explaining that four jurors were excused as a result of

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general voir dire "was sufficient to elicit racial bias as to two prospective jurors, who were then excused for cause"); *People v. Harlan*, 8 P.3d 448, 500 (Colo. 2000) ("The trial court ... removed a juror from the venirepool due to the juror's bias against African-Americans."); *see also State v. Tucker*, 629 A.2d 1067, 1077 n.20 (Conn. 1993); *Commonwealth v. Seabrooks*, 743 N.E.2d 831, 835 (Mass. 2001); *Commonwealth v. Jackson*, 7 N.E.3d 494, 85 Mass. App. Ct. 1117, at *2 (May 1, 2014) (unpublished); *State v. Harris*, 716 A.2d 458, 480 (N.J. 1998); *State v. Long*, 575 A.2d 435, 469 (N.J. 1990) (Handler, J., concurring in part and dissenting in part); *State v. Williams*, 860 P.2d 860, 864 (Or. Ct. App. 1993).

their answers to a questionnaire inquiring into racial bias). The court here used a questionnaire that asked sensitive questions about "incest, sexual assault, or rape" while admonishing venire members not to "show this questionnaire to anyone or discuss it" and assuring that their answers were "NOT A PUBLIC RECORD." J.A. 13–14. Petitioner made no attempt here to include questions about racial attitudes on the questionnaire.

Counsel may also seek to question potential jurors privately, outside the presence of other venire members. *Turner*, 476 U.S. at 37 (mandating voir dire on racial bias and holding that "the trial judge retains discretion ... to question the venire individually or collectively"); *Brewer v. Marshall*, 119 F.3d 993, 995–96 (1st Cir. 1997) ("The judge asked each juror, out of the presence of other jurors, whether they had any bias or prejudice for or against black persons or persons of Hispanic origin."); *Commonwealth v. Jaynes*, 770 N.E.2d 483, 491 & n.10 (Mass. App. Ct. 2002) (explaining that sixteen prospective jurors asked to be questioned in private and eight were excused for cause, including "one who disclosed racial bias"). That option was available in this case. A dozen venire members responded to the judge's invitation for private questioning. R. Tr. 56–78 (Feb. 23, 2010, morning). Another venire member was questioned privately after he disclosed, in response to questions from counsel, that he was familiar with the defendant. *Id.* at 119–20. Nothing prevented defense counsel from privately questioning jurors about their attitudes toward race, ethnicity, and nationality, or requesting that the judge do so.

Petitioner nonetheless asserts that lawyers lack techniques for effectively eliciting honest answers about racial bias. He quotes three practice guides for the proposition that it will rarely be productive to ask jurors "directly" about racial beliefs and other prejudicial attitudes. Pet. Br. 26. Yet in each of those books, the very next sentences explain that counsel should therefore ask prospective jurors *indirectly* about potential biases, and the books go on to give specific advice about how to do so. JAMES J. GOBERT ET AL., JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 7:41 (3d ed. 2015) ("Rather, the issue should be approached more indirectly. ... The following sections are concerned with voir dire of individual jurors in order to reveal racial prejudice."); STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 485–86 (4th ed. 2009) (prescribing indirect questions and assuring that "a resourceful advocate will easily be able to come up with more and better keys to the potential juror's thoughts and attitudes"); THOMAS A. MAUET, TRIAL TECHNIQUES 44–60 (8th ed. 2010) (explaining that "likely beliefs and attitudes are more accurately learned through indirection," and offering methods that "result[ ] in jurors voluntarily disclosing the information you need to intelligently select jurors for th[e] case").[8] Indeed, as the Court of

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[8] Other books offer similar advice. *See, e.g.*, JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION 131–134 (3d ed. 2011) (explaining how to ask questions to elicit answers from reluctant venire members); WALTER E. JORDAN, JURY SELECTION 237–238 (1980) (giving an example of how to avoid the use of the word "prejudice" in exploring racial bias, and explaining that, if the word is unavoidable, counsel can still get forthcoming answers by softening the use of the term); JOEL D. LIEBERMAN & BRUCE D.

Appeals observed below, at trial defense counsel used "similar techniques," just "not in the context of race." Pet. App. 51a–52a. Open-ended questions that fail even to obliquely raise racial bias are not, as Petitioner argues, the only option. Pet. Br. 27

2. ***Strategy***. Petitioner asserts that asking "direct questions" about racial bias also amounts to poor trial strategy, because it might be viewed as insulting or might "rais[e] an issue defense counsel does not want to highlight." Pet. Br. 25.[9] Again, direct questions about racial bias are not the only option, nor are they the most effective. *See supra*, pp. 26–27. But, in any event, if lawyers could not raise uncomfortable topics without offending venire members, voir dire would be of little use. *See Greer*, 968 F.2d at 442 (en banc) (opinion of Higginbotham, J.) ("[S]o long as racial and ethnic prejudices are part of the human condition, we cannot

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SALES, SCIENTIFIC JURY SELECTION 114–115 (2007) (suggesting that venire members are "less likely to admit inability to adhere to due process guarantees when questions were framed in a manner in which a single word answer would suffice"); ROBERT A. WENKE, THE ART OF SELECTING A JURY 66 (1979) (suggesting that rather than ask if a prospective juror is "prejudiced," attorneys should ask about the juror's "feeling," "belief," or "opinion"); *see also* NAT'L JURY PROJECT, INC., JURYWORK: SYSTEMATIC TECHNIQUES § 17.03[4][a] (Elissa Kraus & Beth Bonora eds., 2d ed. 1997) (listing examples of open-ended, indirect questions to explore racial bias).

[9] The book Petitioner quotes for the proposition that race "should probably not be specifically addressed" in voir dire concedes that cases involving interracial sexual offenses are candidates for voir dire on racial bias. TED A. DONNER & RICHARD K. GABRIEL, JURY SELECTION STRATEGY AND SCIENCE §§ 34:2–3, pp. 743–45 (3d ed. 2015) (cited in Pet. Br. 26).

will them away by refusing to probe both for their presence and their reach in a given case. Stoic pretense will not do."). Here, for example, jurors were questioned about intensely sensitive topics, and voir dire on questions of race, ethnicity, and nationality are common in the jurisdiction. J.A. 21–22, 131–32. Thus, it is unlikely that any venire member would have been surprised, let alone insulted, by being asked about racial bias. Indeed, merely asking questions regarding race and ethnicity can counteract racial bias. Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV 843, 860–72 (2015); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL., PUB. POL'Y, & L. 201, 222 (2001); *see also Commonwealth v. McCowen*, 939 N.E.2d 735, 768 n.3 (Mass. 2010) (Ireland, J., concurring) (suggesting that "simply asking jurors these types of questions calls the issue of race to their attention, ... making it more likely that juror bias will be reduced").

If an attorney conducts voir dire on a sensitive subject such as race and is concerned that a line of questioning offended a venire member, the attorney may use a peremptory challenge. Indeed, granting the freedom to ask tough questions is one of the central purposes of peremptory challenges. "[T]he very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." *Swain*, 380 U.S. at 219–20. "Blackstone was acutely aware of this dynamic, observing that ... 'perhaps the

bare questioning [a venire member's] indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set [the venire member] aside.'" *United States v. Annigoni*, 96 F.3d 1132, 1138 (9th Cir. 1996) (en banc) (quoting 4 BLACKSTONE, COMMENTARIES 353 (1st ed. 1769)), *overruled on other grounds by Rivera v. Illinois*, 556 U.S. 148 (2009).

Counsel may of course choose to forego inquiry into racial bias for strategic reasons. But that does not render voir dire unavailable as a tool for protecting the right to an impartial jury. *Warger*, 135 S. Ct. at 524, 529 (during voir dire, defense counsel did not ask whether any juror had past experience with car accidents; voir dire was nonetheless an effective safeguard against juror bias based on such past experience); *cf. Turner*, 476 U.S. at 37 ("[A] defendant cannot complain of a judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry."). As Petitioner acknowledges, "jurors generally possess the 'intelligence, experience, [and] moral integrity' to serve fairly." Pet. Br. 45 (quoting *Batson v. Kentucky*, 476 U.S. 79, 104–05 (1986) (Marshall, J., concurring)). "Surely ... jurors today are not so bigoted, and the system not so fragile," *id.*, that courts and attorneys must fear careful voir dire on questions of racial prejudice.

3. ***Availability***. Petitioner argues that, due to "judicial control" of voir dire, criminal defendants will not always be allowed to inquire into racial bias in every jurisdiction. Pet. Br. 24–25. But in Colorado the

right of parties themselves to ask questions during voir dire is protected by the state rules of procedure, Colo. R. Crim. P 24(a)(3), and Colorado courts have long held that the right to voir dire on racial prejudice is "undisputed." *Maes v. District Court*, 503 P.2d 621, 624–25 (Colo. 1972). Here, the trial judge was surprised that defense counsel had not asked questions on the topic, remarking that "those questions are always asked." J.A. 131–32. Petitioner cannot plausibly claim that Colorado litigants are "foreclosed entirely" from exploring racial bias in voir dire, Pet. Br. 25, when he made no attempt to do so. In *Tanner* and *Warger*, this Court assessed the constitutionality of Federal Rule 606(b) against the trial processes available in federal courts. The constitutionality of Colorado's rule should similarly be assessed against the trial processes available to *Colorado* defendants—and, indeed, to Petitioner in this very case.

Colorado aside, Petitioner's argument about the availability of voir dire on race may present theoretical concerns in some jurisdictions. But this Court has long said that federal trial courts should grant voir dire on racial bias if requested. *Rosales-Lopez*, 451 U.S. at 191 n.7 (plurality opinion); *Ristaino*, 424 U.S. at 597 n.9; *Aldridge v. United States*, 283 U.S. 308, 313–14 (1931). Consistent with that guidance, federal judges across the country routinely conduct voir dire on racial bias. *See, e.g.*, *Brewer*, 119 F.3d at 995–96 (the trial court insisted that defense counsel check with his client about whether to conduct voir dire on racial bias; the ensuing examination led to one juror being excused).

B. The other *Tanner* safeguards likewise protect against racial bias.

In addition to voir dire, this Court has identified three other "aspects of the trial process" that protect "Sixth Amendment interests," *Tanner*, 483 U.S. at 127, and specifically ensure "juror impartiality," *Warger*, 135 S. Ct. at 529. While Petitioner dismisses these safeguards as well, state and federal case law demonstrates that each safeguard has historically been effective in protecting against racial bias.

1. ***Pre-Verdict Juror Reports***. "[J]urors are observable by each other, and may report inappropriate juror behavior to the court *before* they render a verdict." *Tanner*, 483 U.S. at 127 Court decisions demonstrate that jurors are, in fact, willing to come forward when other jurors express racial bias.[10]

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[10] *See, e.g.*, *United States v. Muhammad*, 336 Fed. App'x 188, 190–91 (3d Cir. 2009) (unpublished) (mid-trial, a juror reported another juror's racial comments; the court dismissed both the biased juror and another juror who had been opposed to reporting); *United States v. McClinton*, 135 F.3d 1178, 1184–85 (7th Cir. 1998) (mid-trial, a juror reported two other jurors' apparent racial comments; the judge conducted a mid-trial voir dire of every juror and dismissed one); *United States v. Caporale*, 806 F.2d 1487, 1504 & n.21 (11th Cir. 1986) (a juror sent a note to the judge expressing concern that other jurors were racially biased); *United States v. Heller*, 785 F.2d 1524, 1525–29 (11th Cir. 1986) (during deliberations, the foreperson sent the judge a note regarding biased statements; the trial judge performed voir dire of each juror, revealing pervasive anti-Semitism; the appeals court remanded for retrial because the voir dire was "superficial at best"); *Tavares v. Holbrook*, 779 F.2d 1, 1–3 (1st Cir. 1985) (Breyer, J.) (during deliberations, an alternate juror reported a potentially racial statement; the trial court questioned each juror individually and

Citing none of these decisions, Petitioner claims that "[t]he possibility that jurors may report racially biased remarks ... is remote at best." Pet. Br. 22. He asserts that jurors will seek to avoid "unwanted conflict," will be subject to "strong group pressures," and will refuse to report racial bias through a foreperson. *Id.* at 23–24 & n.6. The cases on juror reporting refute these arguments. So do other cases demonstrating jurors' willingness to confront and challenge racial remarks in the jury room. *E.g.*, *United States v. Benally*, 546 F.3d 1230, 1231–32 (10th Cir. 2008) (noting that a juror "argued with the foreman" about racial remarks, "going back and forth several times"); *McCowen*, 939 N.E.2d at 762 (describing a heated confrontation between jurors regarding racial

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denied a mistrial); *McFarland v. Hill*, No. C13-00147 EJD (PR), 2014 WL 3867261, at *3 (N.D. Cal. Aug. 5, 2014) (during deliberations, a juror sent a note to the court regarding another juror's racial comments; the court responded by giving jurors additional instructions); *Li v. Artuz*, No. 01CIV4530 LTS MHD., 2002 WL 48323, at *1 (S.D.N.Y. Jan. 11, 2002) (the court received a note from a juror complaining that another juror had made a potentially racist remark; the court inquired and determined that deliberations could continue); *People v. Weatherwax*, No. E030347, 2006 WL 2838496, *4 (Cal. App. Oct. 5, 2006) (unpublished) (a foreperson's report to the court that a juror was refusing to deliberate prompted an inquiry into possible juror racial bias); *Pham v. State*, 70 So. 3d 485, 492–93 (Fla. 2011) (an alternate juror wrote a mid-trial letter to the court stating that she had heard jurors making statements about the Vietnamese defendant; the court questioned the jurors, whose statements were found not to rise to the level of ethnic bias); *State v. McDowell*, No. COA05-424, 179 N.C. App. 436, at **3–5 (Sept. 5, 2006) (unpublished) (before closing arguments, a juror told the bailiff that another juror had made a racial comment; the judge conducted voir dire on that issue).

comments). Here, the jury did not avoid unwanted conflict. Deliberations lasted a day and a half and included times during which the jury "got very loud for a while." J.A. 69.

Petitioner also claims, in spite of the case law, that "jurors may not realize that racially biased statements ... are legally impermissible." Pet. Br. 22. That is unlikely to be true of most jurors, given that, as Petitioner acknowledges, racial bias is "generally met with social condemnation." *Id.* at 27 If necessary, an instruction can clarify the matter. Here, for example, a stock instruction stated, "You are instructed not to allow gender bias or any kind of prejudice based upon gender to influence your decision." J.A. 57. Similar instructions can be used to address racial bias. *See* Jud. Council of Cal. Crim. Jury Instructions, No. 200 (2016); *Okla. Unif. Jury Instructions for Juvenile Cases*, 2005 OK 12, ¶ 6, 116 P.3d 119, 123 (Okla. 2005). Petitioner could have requested the court give such an instruction here—as other Colorado courts have done—but did not. *Harlan*, 8 P.3d at 500 ("[T]he trial court instructed the jury that it 'must not consider the race, gender or personal appearance of [the defendant].'").

2. ***Nonjuror Evidence***. "[T]he potential use of 'nonjuror evidence'" may also safeguard a defendant's right to an impartial jury. *Warger*, 135 S. Ct. at 529. Petitioner claims that nonjuror evidence of "racially prejudiced statements *during* deliberations rarely exists," Pet. Br. 27 (emphasis added), but this overlooks the potential for racial bias to be expressed *outside the jury room*. For example, in one case the prosecutor informed the court that a person had overheard a juror making racial remarks about the defendant at a bar.

After investigating the allegations, the judge dismissed the juror. *Escobedo v. Lund*, 948 F. Supp. 2d 951, 960–61 (N.D. Iowa 2013). In another, the court granted a new trial when a probation officer reported that a probationer in an unrelated case overheard a juror's racial comments made one evening at a club. *United States v. Fuentes*, No. 2:12-CR-50-DBH, 2013 WL 4401803, at **2–3, 9 (D. Me. Aug. 15, 2013). Other cases tell similar stories. *See United States v. McDuffie*, 24 Fed. App'x 167, 173 (4th Cir. 2001) (unpublished) (a departing juror made a potentially racial remark to prosecutors about the O.J. Simpson case); *Cooke v. State*, 97 A.3d 513, 548 (Del. 2014) (a potential juror's neighbor reported racial comments the potential juror had made in reference to the case); *People v. Du Pree*, 363 N.E.2d 910, 912 (Ill. App. 1977) (friends of the defendant reported racial comments made by jurors in a court restroom).

The modern phenomenon of social media has created an additional opportunity for litigants to discover evidence of a juror's potential bias. *Cf. United States v. Liu*, 69 F Supp. 3d 374, 381 (S.D.N.Y. 2014) (after a verdict was rendered in an immigration fraud case, a juror Tweeted, "[T]hese people prey on the fear and relative ignorance of applicants. It's horrible."); *W.G.M. v. State*, 140 So. 3d 491, 495 (Ala. Crim. App. 2013) (the defendant discovered that jurors had a "social media network relationship" with employees of the district attorney's office); *State v. Webster*, 865 N.W.2d 223, 239 (Iowa 2015) (during trial, a juror "liked" a Facebook comment by the victim's stepmother that stated, "[g]ive me strength"). Use of social media for this purpose is becoming more common. The American Bar Association issued a formal opinion

explaining that "a lawyer may review a juror's or potential juror's Internet presence" and "must take reasonable remedial measures" if the lawyer "discovers evidence of ... misconduct." ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

3. ***Observation During Trial***. Finally, "the observations of court and counsel during trial" can protect against juror bias. *Warger*, 135 S. Ct. at 529. Court personnel interact with jurors constantly: they escort jurors to and from the jury room, give the jurors suggestions about places to eat near the courthouse, and bring the jurors lunches on days the jury is deliberating. All of these interactions present opportunities for court personnel to observe juror behavior, including expressions of possible bias. *United States v. Patterson*, No. 04CR705–1, 2007 WL 1438658, at **4–5 (N.D. Ill. May 15, 2007) (a juror had described observers in the gallery as "unsavory people" to a court security officer, prompting the court and defense counsel to conduct a mid-trial inquiry into possible juror racial bias); *State v. Johnson*, 630 N.W.2d 79, 80 (S.D. 2001) (a prosecutor learned that, on a recess during voir dire, two of the prospective jurors had been overheard making racial comments). The likelihood of attorneys and courtroom personnel learning about possible racial bias is at least as great as the likelihood of their learning about the sort of bias examined in *Warger*. And *Warger* held that "juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered." 135 S. Ct. at 529.

C. Beyond the *Tanner* safeguards, other protections of the jury system counteract the potential for biased juries.

Tanner and *Warger* cited four safeguards against juror misconduct and impartiality, concluding that those alone are sufficient to obviate the need for an exception to the no-impeachment rule. But the Court did not hold that the list was exclusive. Three other structural protections of the jury system—some mandated by the Sixth Amendment itself—help to minimize the potential for jury bias, including bias based on race, ethnicity, or nationality. All three of those protections were honored in this case.

1. ***Fair Cross-Section of the Community***. The Sixth Amendment demands, as part of "the American concept of the jury trial," that state and federal juries be drawn from a "fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). This means that "the jury wheels ... from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538. The fair-cross-section requirement accomplishes two ends related to jury impartiality, both of which serve to counteract potential racial bias.

First, the requirement signals to the public, and to jurors in particular, that juries are "not the organ of any special group or class." *Id.* at 527 (quoting *Glasser v. United States*, 315 U.S. 60, 85–86 (1942)). "Community participation in the administration of the criminal law ... is not only consistent with our democratic heritage but is also critical to public

confidence in the fairness of the criminal justice system." *Id.* at 530.

Second, the "broad representative character of the jury" is an "assurance of a diffused impartiality " *Id.* (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)). This is not because the Court "assume[s] that the excluded group will consistently vote as a class"; rather, it is because full and fair deliberation is enhanced by diversity of "qualities of human nature and varieties of human experience." *Id.* at 532 n.12 (quoting *Peters v. Kiff*, 407 U.S. 493, 502–04 (1972) (plurality opinion)). "[A] jury constituted of individuals with diverse perspectives, coming from the various classes of society, is greater than the sum of its respective parts .... In short, it is believed that diversity begets impartiality." *State v. LeMere*, 2 P.3d 204, 212 (Mont. 2000); *see also Hennepin Cnty. v. Perry*, 561 N.W.2d 889, 899 (Minn. 1997) ("The goal of jury impartiality is best achieved through the widest possible range of views and experiences."). Studies confirm that diverse groups deliberate longer and consider a wider range of information than homogeneous groups. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606–10 (2006).

Colorado guards this fair-cross-section right, and thus the concomitant right to an impartial jury, meticulously. In 2008, the state supreme court decided a case involving the local jurisdiction at issue here, Arapahoe County, Colorado. *Washington v. People*, 186 P.3d 594 (Colo. 2008). Under review was a jury

selection practice that resulted in statistically significant, but "minimal" effects on diversity: "in every three 90- to 100-person jury panels" (that is, in every 270 to 300 selections for jury service) the practice reduced by "less than one" the number of African American and Hispanic jurors. *Id.* at 597. This slight disparity of only 0.3 percent did not violate the Sixth Amendment—the participation of those two groups on jury panels matched almost precisely their percentage of the county's overall population. *Id.* at 598–99, 606. Even so, the court "disapprove[d] of [the selection practice] and direct[ed] that it be stopped immediately." *Id.* at 596.

There is no claim here that the jury, selected from a sixty-one-person venire, departed from the fair-cross-section requirement.

2. ***Batson v. Kentucky***. Although based on equal protection rather than the Sixth Amendment, the prohibition against discriminatory use of peremptory strikes—by either the prosecutor or the defendant—complements the fair-cross-section requirement. It assures that voir dire serves the function for which it was designed; that is, it ensures jurors are selected based on their "ability impartially to consider evidence presented at a trial." *Batson*, 476 U.S. at 87 It also emphasizes to prospective jurors that courts are governed by equal justice under the law. "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Id.* at 99; *accord Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic

element of the law, as it ... ensures continued acceptance of the laws by all of the people."). Here, there is no dispute that the *Batson* rule and the vital interests it serves were fully honored. J.A. 36 (confirming that neither party had a *Batson* claim).

3. ***Jury Size and Unanimity***. Finally, jury size, together with the requirement that verdicts be unanimous in criminal cases, enhances the deliberative process and counteracts potential juror bias.

Colorado, like the federal government and the vast majority of States, grants felony defendants the right to a jury of twelve. COLO. REV. STAT. § 18-1-406 (2015); 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.1(d), p. 22. This number of jurors—double the Sixth Amendment's minimum—promotes effective group deliberation and thus "counterbalanc[es] various biases." *Ballew v. Georgia*, 435 U.S. 223, 233–34, 236–37 (1978) (plurality opinion). "Larger juries deliberate longer, and ... are more likely to produce accurate results ... [and] return verdicts in accord with community values." 6 LAFAVE, CRIMINAL PROCEDURE, at § 22.1(d), p. 20 (quoting ABA Principles for Jury Trials, Principle 3 and Comment (2006)); *accord id.* at § 22.1(d), p. 20 n.83 (collecting sources).

The deliberative value of large juries is further enhanced by jury unanimity—required in Colorado and, again, in the vast majority of States. "Most states consider unanimity to be an essential attribute of the right to jury trial. ... [Unanimity] ensure[s] careful assessment of the evidence by the jury, enable[s] minority viewpoints to be heard and considered, and reinforce[s] the requirement of proof beyond a reasonable doubt." *Id.* at § 22.1(c), p. 25; *see also id.* at

§ 22.1(d), p. 20 & n.85 (noting that larger juries fail to reach unanimity more often because they are more likely to include more than one dissenting juror); *accord* HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY, 462–63 (1966).

Thus, even when a juror expresses racial bias, the requirement that a twelve-person jury reach a unanimous decision guards against a verdict contrary to "the evidence and the law." *Benally*, 546 F.3d at 1241 (finding it significant that a juror who objected to racial comments joined the verdict). Here, the twelve-person jury deliberated for nearly a day and half, reaching unanimity on three counts for which the evidence was compelling.[11] It did not reach unanimity on the sole felony count for which, based on the testimony of the victim herself, the evidence was less conclusive. This confirms that the jury carefully weighed the evidence for each count. *United States v. Shalhout*, 507 Fed. App'x 201, 207 (3d Cir. 2012) (unpublished) (holding that a jury's partial acquittals "support the conclusion that the jury was not racially biased"); *cf. Skilling v. United States*, 561 U.S. 358, 384 (2010) ("The jury's ability to discern a failure of proof of

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[11] Petitioner asserts that the evidence in this case was "questionable." Pet. Br. 45. He does not directly explain why; instead, he implies that the evidence was deficient by mirroring defense counsel's closing argument at trial. *Compare* Pet. Br. 6 *with* R. Tr. 49–65 (Feb. 25, 2010). That characterization of the case was rejected by a unanimous jury. And, in any event, "this case had little to distinguish it from many other cases." *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987). "It required the jury to make a basic credibility choice," *id.*, here, between the three victims, their father, and three sheriff's deputies, on the one hand, and a single alibi witness, on the other.

guilt of some of the alleged crimes indicates a fair minded consideration of the issues ...." (parenthetically quoting *United States v. Arzola-Amaya*, 867 F.2d 1504, 1514 (5th Cir. 1989)). The district court below polled the jury and "each juror orally affirmed that these were their individual verdicts." J.A. 85. Based on the record, Colorado's jury size and unanimity requirements served their important functions in this case.

II. Petitioner's proposed constitutional exception to no-impeachment rules will undermine vital interests of the jury system and upset various jurisdictions' careful balancing of these interests.

In the context of a jury system that includes the safeguards against juror bias described above, this Court has consistently refused to create exceptions to no-impeachment rules. "[T]he right to jury trial in criminal cases [is] fundamental to our system of justice." *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968). And, as the Court has held, no-impeachment rules serve "long-recognized and very substantial concerns [that] support the protection of jury deliberations from intrusive inquiry." *Tanner*, 483 U.S. at 127; *see also Warger*, 135 S. Ct. at 529; *McDonald*, 238 U.S. at 267–68. Those concerns apply here.

First, the various interests that no-impeachment rules serve—full and frank discussion, verdict finality, preventing juror harassment, preserving public confidence in juries, and jury independence—do not lose their force based on the type of juror bias at issue. They apply here just as they did in *Tanner* and *Warger*. Second, each jurisdiction must strike a balance among the different policy considerations that animate no-

impeachment rules. Petitioner's requested mandatory exception will upset this balance and preclude jurisdictions from uniformly applying their no-impeachment rules to avoid disparate outcomes across cases.

A. The weighty justifications for the rule remain valid in the context of racial bias.

Petitioner's proposal to mandate a constitutional exception to Rule 606(b)—like previous proposed, but rejected, exceptions—would undermine "long-recognized and very substantial concerns" in favor of jury secrecy. *Tanner*, 483 U.S. at 127; *see also Warger*, 135 S. Ct. at 528 (rejecting the petitioner's "particular exception to the Rule" because it "would represent a threat to both jurors and finality in those circumstances not covered by the Rule's express exceptions"); *McDonald*, 238 U.S. at 267–68.

Petitioner asserts that "[t]he policy rationales underlying Rule 606(b) are insufficient to outweigh a defendant's constitutional right to present evidence that a juror infected deliberations with racial bias." Pet. Br. 33. But, at base, this argument "assert[s] that [the] concerns [underlying the no-impeachment rule] were misplaced." *Warger*, 135 S. Ct. at 528. The Court has rejected that argument. *Id.*

1. ***Full and Frank Discussion***. In *Tanner*, this Court recognized the long-standing concern that post-verdict inquiry about what was said in deliberations threatens "full and frank discussion in the jury room." 483 U.S. at 119–21. "It is essential that jurors express themselves candidly and vigorously as they discuss the evidence presented in court. The prospect that their

words could be subjected to judicial critique and public cross examination would surely give jurors pause before they speak." *Benally*, 546 F.3d at 1234. Petitioner's two arguments to the contrary have been rejected by this Court.

In his first argument, Petitioner asserts that there "is no valid interest in creating breathing space for jurors to argue that a defendant should be convicted because of her race." Pet. Br. 34–35. That misses the broader purpose of Rule 606(b). Allowing examination of jurors' internal thought processes will inhibit not just discussion of improper topics but also the "fruitful exchange of ideas and impressions" regarding *all* topics. *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987) (explaining the importance of full and frank discussion in a case involving allegations of a juror's racial bias); *see also Benally*, 546 F.3d at 1234 ("[T]he rule protects the deliberative process in a broader sense."). In *McDonald*, for example, the Court could have adopted a quotient-verdict exception to the no-impeachment rule without "undermin[ing] any legally acceptable discussion in the jury room." Pet. Br. 34. Yet the Court refused to begin carving judicial exceptions from the rule, fearing that doing so would lead to "the destruction of all frankness and freedom of discussion." *McDonald*, 238 U.S. at 268.[12] Likewise in *Tanner* The

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[12] Petitioner claims that in *Clark v. United States*, 289 U.S. 1 (1933), this Court recognized the need to "stifle" "freedom of debate" in some situations. Pet Br. 34 (quoting *Clark*, 289 U.S. at 13). But *Clark* is inapposite; it involved not impeachment of a verdict but prosecution of a juror for criminal contempt. This is why, two years ago in *Warger*, the Court rejected Petitioner's argument as a misreading of *Clark*: "[N]othing in [*Clark*] was 'at

Court was not concerned about chilling discussion about jurors' drug and alcohol use during trial or chilling the misconduct itself. The fear instead was that the increased potential for "a barrage of postverdict scrutiny" would undermine "full and frank discussion in the jury room." 483 U.S. at 120–21.

One court has suggested that it is better for racial bias to remain "a silent factor with a particular juror" than to have the juror reveal his or her thinking. *Powell v. Allstate Ins. Co.*, 652 So. 2d 354, 357–58 (Fla. 1995). But silent bias can be even more damaging than expressed bias. Silent bias cannot be confronted, nor can it be reported to the court before deliberations end. Expressed bias can. And, contrary to Petitioner's assertion that racial comments will "infect" deliberations, *see, e.g.* Pet. Br. 17, 21, when confronted with racial statements, jurors typically respond by ensuring that their own reasoning is untainted by prejudice. Sommers & Ellsworth, 7 PSYCHOL., PUB. POL'Y, & L. at 209; *see also* Samuel L. Sommers & Phoebe C. Ellsworth, *The Jury and Race: How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1013–14, 1027 (2003). In *Benally*, for example, a juror was able to "counter[ ]" racial bias precisely because it was expressed. *Benally*, 546 F.3d at 1241. It is reasonable—and constitutional—for jurisdictions like Colorado to believe that, if an

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variance with the rule ... that the testimony of a juror is not admissible for the impeachment of his verdict.' This was because ... 'the rule against impeachment [was] wholly unrelated to the problem ... before us [in *Clark*].'" *Warger*, 135 S. Ct. at 527 (quoting *Clark*, 289 U.S. at 18).

exception to the no-impeachment rule would drive racism underground so that it becomes a "silent factor" in deliberations, *Powell*, 652 So.2d at 357–58, the exception may do more harm than good.

Petitioner's second argument is that because jurors are free to voluntarily disclose anything said in deliberations, the effect of his proposed exception would be "negligible." Pet. Br. 35–36. The Court has rejected this argument. *Warger*, 135 S. Ct. at 528 ("[Petitioner] observes that jurors remain free to ... disclose what happened in the jury room .... [He] cannot escape the scope of the Rule Congress adopted simply by asserting that its concerns were misplaced."). Voluntary disclosure occurs on jurors' own terms, and any juror may decline to speak to counsel or the press. *See* J.A. 85–86 (instructing jurors that "whether you talk to anyone is entirely your own decision" and "you may tell them as much or as little as you like"). The prospect of being subpoenaed to face examination and cross-examination presents an entirely different set of concerns regarding jurors' willingness to fully, fairly, and vigorously discuss and debate the evidence and the issues.

2. ***Finality***. "Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process." *Tanner*, 483 U.S. at 120. Petitioner contends that this finality interest is not compelling because his proposed exception to the no-impeachment rule will disturb few verdicts. He relies on an amicus brief filed in his favor, whose authors located only two dozen court decisions that have required new trials. Pet. Br. 39.

Finality, however, is disrupted not only when a court actually disturbs a verdict but also when it allows inquiry into the verdict's validity. Here, the verdict was handed down in February, but Juror H.C. was not called to testify until August and the trial court's final order was not handed down until the last day of September More than seven months—216 days—elapsed between the verdict and the resolution of Petitioner's challenge to it. Sentencing was delayed during that entire seven months. *See* J.A. 102–03. Another example is *United States v. Villar*. After a remand from the First Circuit, the district court "held an evidentiary hearing [on the defendant's motion to set aside the verdict for racial bias], interviewed all the jurors, made detailed factual findings (including credibility determinations), and concluded, based on these findings, that the jurors were not biased." 411 Fed. App'x 342, 342 (1st Cir. 2011). Defendant filed a second appeal, in which the First Circuit "summarily affirm[ed] validation of the judgment of conviction." *Id.* The entire process lasted three and a half years from the time defendant's motion was first filed.

A separate problem with Petitioner's argument is that there is no way to gauge the accuracy of his statistics. The amicus brief relies almost entirely on reported and published appellate court decisions. *See* Appendices to Ctr. on Admin. of Crim. Law Amicus Br. 1a–8a. But many of the States that follow Petitioner's proposed rule severely restrict, or prohibit entirely, the prosecution from appealing orders granting new

trials.[13] Even in States that authorize such appeals, the prosecution would be unlikely to appeal every order granting a new trial, and the defense may not appeal the denial of a new trial motion in every case. And where an appeal was filed, the resulting opinion may not be reported in Westlaw, the only source Petitioner's amicus relies on. There is little chance that Petitioner's sample is representative of the relevant universe of cases.

Petitioner's assurance that his rule will have minimal effect on verdict finality is dubious for other reasons. A ruling by this Court in Petitioner's favor would extend to both criminal and civil actions. *See Warger*, 135 S. Ct. at 528 ("The Constitution guarantees both criminal and civil litigants a right to an impartial jury."). And ruling for Petitioner here would require unsettling verdicts based on a wide variety of alleged biases, given that an exception limited to racial bias would be untenable. *See* Pet. Br. 43–44; *infra*, pp. 54–56 & n. 15. Further, litigants will no doubt argue, perhaps successfully, that fairness requires additional exceptions to the no-impeachment rule. *Infra*, pp. 54–56. "[L]et it once be established that verdicts solemnly made and publicly returned into

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[13] *See State v. Morrissette*, 830 A.2d 704, 705–06, 710 (Conn. 2003) (construing CONN. GEN. STAT. § 52-263); *State v. Johnson*, 450 S.W.3d 457, 459–60 (Mo. Ct. App. 2014) (construing MO. REV. STAT. § 547.200); *see also* KAN. STAT. ANN. § 22-3602(b) (2016) (authorizing appeals of orders granting new trials only for certain crimes); MINN. R. CRIM. P. 28.04, subd. 1(7) (prosecution may appeal from an order for a new trial only if district court "expressly stated" that its order was "based ... exclusively on a question of law that ... is so important or doubtful that the appellate courts should decide it").

court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding." *McDonald*, 238 U.S. at 267

3. ***Harassment of Jurors***. The federal version of Rule 606(b) was adopted in part because a weaker rule "would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors." *Tanner*, 483 U.S. at 124 (quoting S. Rep. No. 93-1277, pp. 13–14 (1974)). The Colorado Supreme Court expressed similar concerns below, reasoning that to adopt Petitioner's exception would "incentivize post-verdict harassment of jurors." Pet. App. 15a.

Petitioner argues that his exception to the no-impeachment rule would not cause jurors to be harassed by counsel, because States have rules of professional conduct to regulate attorney behavior. Pet. Br. 37–38. *Warger* rejected that very argument, 135 S. Ct. at 528, and for good reason. Attorneys have significant incentive to push the boundaries of these ethical rules. *Tanner*, 483 U.S. at 126 ("[One] juror affidavit ... was obtained in clear violation of the District Court's order and the court's local rule against juror interviews ...."). And the concern lies not just in what a judge or disciplinary board might deem to violate ethical rules but also in lesser ways in which lawyers and courts, after verdicts are rendered, pursue jurors for information. "A juror who reluctantly joined a verdict is likely to be sympathetic to overtures by the loser, and persuadable to the view that his own consent rested on false or impermissible considerations, and

the truth will be hard to know." 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, § 6:16, p. 75 (4th ed. 2013); *accord United States v. Villar*, 586 F.3d 76, 88 (1st Cir. 2009) ("[J]ury verdicts could be easily undermined by post-judgment comments ... coaxed from jurors with second thoughts.").

The post-verdict inquiry itself is a burden on jurors, who may be called for hearings at which they are examined and cross-examined, regardless of which juror made an allegedly biased statement. *E.g.*, *Villar*, 411 Fed. App'x at 342. This is particularly burdensome when, as is often the case, the inquiry takes place long after a verdict is handed down. *See id.*; *see also* J.A. 114 (noting that one juror "is relocating soon to Texas"). "Such potential for post verdict interference is hardly calculated to encourage the public to accept jury service." 3 MARK S. BRODIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE § 606App.01[3], p. 606App.-6 (2d ed. 2015) (quoting 120 CONG. REC. H550–51 (daily ed. Feb. 6, 1974) (statement of Rep. Wiggins)).

4. ***Confidence in the Jury System***. The Colorado Supreme Court expressed concern that inquiring into internal juror deliberations would compromise "public confidence in the fundamental notion of trial by jury." Pet. App. 13a (citing *Tanner*, 483 U.S. at 120). This fear is not unfounded. Denying an inquiry into the verdict in *Tanner* but allowing it here would appear to treat defendants unequally despite compelling reasons not to. *Benally*, 546 F.3d at 1241. And the alternative—granting an exception to Rule 606(b) for any jury misconduct or bias deemed "serious" enough to warrant one, Pet. App. 15a—would mean that the jury would no longer be an independent body in the

eyes of the law or in the eyes of observers. *Benally*, 546 F.3d at 1233.

5. ***Jury Independence***. Finally, the no-impeachment rule ensures that verdicts are the products of lay juries and not of professional judges. "If courts were permitted to retry [jury] verdicts, the result would be that every jury verdict would either become the court's verdict or would be permitted to stand only by the court's leave. This would destroy the effectiveness of the jury process which substantial justice demands and the constitution guarantees." *United States v. D'Angelo*, 598 F.2d 1002, 1005 (5th Cir. 1979); *accord Benally*, 546 F.3d at 1233.

The no-impeachment rule has always fostered the jury's independence. In the century before America's founding, if an English judge disagreed with a verdict, he could refuse to accept it, probe the jurors' rationale, give them further instruction, and have them redeliberate to arrive at the judge's preferred outcome. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 326–29 (Oxford Univ. Press 2010). Americans, in contrast, saw an independent jury "as a basic guarantor of individual freedom," LEONARD W LEVY, THE PALLADIUM OF JUSTICE: ORIGINS OF TRIAL BY JURY 85 (1999), and the "very palladium of free government." THE FEDERALIST NO. 83 (Alexander Hamilton). Given the American understanding of the proper relationship between judge and jury, it is unsurprising that Lord Mansfield's 1785 no-impeachment rule gained "near-universal" acceptance in the United States. *Tanner*, 483 U.S. at 117. Without a strong no-impeachment rule, "[t]he triers themselves would be tried at the behest of the verdict loser." 3

MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:16, p. 75.

Petitioner asserts that racial bias "converts the jury itself into an instrument of oppression." Pet. Br 18. That could be said of many forms of juror misconduct that fall within the scope of the no-impeachment rule. *See, e.g.*, 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:17, p. 79 (noting that the rule bars "proof that one or more jurors held it against the accused that he [invoked his right not to testify]"). Even so, no-impeachment rules remain committed to the fundamental principle of jury independence. "[T]he very purpose behind Rule 606(b) is to preserve one of the most basic and critical precepts of the American justice system: the integrity of the jury." *United States v. Logan*, 250 F.3d 350, 379–80 (6th Cir. 2001); *see also* 27 WRIGHT & GOLD, FEDERAL PRACTICE & PROCEDURE § 6072, pp. 464–65 (2d ed. 2007). Allowing inquiry into jurors' internal thoughts and feelings, even in cases of alleged racial bias, would undermine juror independence and could alter jurors' commitment to full and fair deliberation—including their willingness to confront or report expressions of bias in the jury room. *Benally*, 546 F.3d at 1234 ("Had she known that the judge would review the jury's reasoning process, ... Juror K.C. might not have argued so persistently with the foreman [about his racial comments].").

Petitioner also argues that "every state, as well as federal law" recognizes exceptions to the no-impeachment rule in "various circumstances." Pet. Br 30. Those "various circumstances" involve objectively observable, extraneous influences that do not reveal the jury's internal discussions. *See id.*; 1 MCCORMICK

ON EVIDENCE § 68 (7th ed. 2013). Tolerating those limited inquiries does not suggest that further exceptions—particularly ones aimed at jurors' internal deliberations and thought processes—would do no harm. *See Warger*, 135 S. Ct. at 528. This Court has rejected the suggestion that by admitting narrow exceptions to no-impeachment rules, States abandon their interest in preventing *other* post-verdict inquiries. *Id.* at 530 (rejecting an argument that would have allowed the narrow "'extraneous' information exception [to] swallow much of the rest of Rule 606(b)").

B. This Court should not mandate an exception to no-impeachment rules that would upset States' policy decisions and produce arbitrary outcomes across cases.

The approaches to the no-impeachment rule taken by different States—including Colorado—embody varied but constitutional policy choices. Petitioner identifies jurisdictions that admit juror testimony regarding racial bias "irrespective of any Sixth Amendment imperative." Pet. Br. 30–31.[14] Most of

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[14] The Oklahoma case Petitioner cites, Pet. Br. 31 n.8, is inapposite. It involved not statements a juror made during deliberations, but statements a juror made in a bar after a verdict was rendered. *Fields v. Saunders*, 278 P.3d 577, 581 (Okla. 2012) ("[T]his is a fact specific case of juror bias and not a case of a juror impeaching a verdict.").

Further, although Petitioner claims that the "[t]he Model Code and Uniform Rules of Evidence ... recommend allowing juror testimony to report any improper statement during deliberations," Pet. Br. 30, this is not fully accurate. The 1942 Model Code recommended this expansive approach, contrary to "the majority

those jurisdictions adhere to the "Iowa Rule," which permits the introduction of *any* verbal statement by a juror and bars testimony only as to "matter[s] resting alone in the juror's breast." *Powell*, 652 So. 2d at 357 (internal quotation marks omitted). On the question of racial bias, the approaches in these and other jurisdictions are by no means uniform. *Compare id.* (explaining that "appeals to racial bias" are always exempt from the no-impeachment rule) *with State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980) (allowing an exception to Rule 606(b) only if "substantial evidence supports the claim that racial prejudice infected the verdict").

That these jurisdictions choose to balance competing interests in a particular way does not mean that their policy choice is constitutionally required. *See Warger*, 135 S. Ct. at 527 ("Congress was undoubtedly free to prescribe a broader version of the anti-impeachment rule than we had previously applied"). This Court and Congress considered adopting the Iowa Rule but rejected it in favor of "the restrictive federal approach." *Warger*, 135 S. Ct. at 530. This was "no accident." *Id.* at 527. It was a decision made after significant debate in both houses of Congress, which weighed the various public policies in favor of each version of the rule. *Tanner*, 483 U.S. at 122–25 (recounting the history of the Court's proposal for the rule and the ensuing Congressional debate). "[T]he

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of American cases." AM. LAW INST., MODEL CODE OF EVIDENCE, Rule 301 & Comment, p. 174 (1942). Since 1974, however, the Uniform Rule has been "substantially identical" to Federal Rule 606(b). 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE, at § 6:15, p. 63.

legislative history demonstrates with uncommon clarity that Congress specifically understood, considered, and rejected a version of Rule 606(b) that would have allowed jurors to testify on juror conduct during deliberations. ..." *Id.* at 125.

Petitioner's proposed exception would undermine the careful policy decisions that Congress and jurisdictions like Colorado have made. It would require drawing lines among different kinds of juror misconduct, contrary to the plain language of Rule 606(b). Specifically, Petitioner argues that his categorical exception to Rule 606(b) may address only racial bias, because nothing "compel[s] the judiciary to police all potential forms of bias." *Id.* at 42. But in making Rule 606(b)'s application turn on the particular form of bias a juror is alleged to have expressed in deliberations, Petitioner's approach would create disparities among defendants with other compelling Sixth Amendment claims. As the Colorado Supreme Court observed below, "we cannot discern a dividing line between different *types* of juror bias or misconduct, whereby one form of partiality would implicate a party's Sixth Amendment right while another would not." Pet. App. 14a–15a. "To draw such a line would .... require trial courts to make arbitrary judgments." *Id.* at 15a.

To illustrate, Petitioner's proposed rule would require an exception for racial bias yet allow exclusion of evidence revealing "profoundly disturbing" juror misconduct. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part); *see also* 3 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 6:17, pp. 76–84 (cataloguing various juror biases and

misconduct excluded by Rule 606(b)). It would allow courts to exclude evidence that a majority of jurors drank "pitchers of beer," "liter[s] of wine," and mixed drinks over lunch, causing some to sleep through the afternoons, while four used marijuana and two used cocaine on breaks. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part). It would allow exclusion of evidence of jurors' "insanity, inability to understand English, and hearing impairments." *Warger*, 135 S. Ct. at 530 (citing *Tanner*, 483 U.S. at 119). It would allow exclusion of testimony that "a feckless jury decide[d] the parties' fates through a coin flip or roll of the dice." *United States v. Shiu Lung Leung*, 796 F.3d 1032, 1036 (9th Cir. 2015); *see also McDonald*, 238 U.S. at 266 (excluding evidence that jurors rendered a "quotient verdict" after "protesting jurors finally yielded"). And it would allow exclusion of testimony regarding many significant biases prejudicing jurors against one of the parties. *See Warger*, 135 S. Ct. 528–29.[15]

In all of these circumstances, important policies justify applying the no-impeachment rule, and those policies apply no less to Petitioner's proposed exception. Racial prejudice is repugnant and has no place in a

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[15] Petitioner suggests that, if the Court finds no principled way to limit its ruling to racial bias, it create a constitutional exception to Rule 606(b) for bias against any class of individuals that, in purposeful discrimination cases, would receive more than rational basis review. Pet. Br. 43–44. This approach would still entail choosing among types of juror misconduct entitled to a constitutional exception, and it would still deny relief to defendants faced with other "profoundly disturbing" jury behavior. *Tanner*, 483 U.S. at 135–36 (Marshall, J., concurring in part and dissenting in part).

courtroom, but "[i]f a jury does not follow the jury instructions, or ignores relevant evidence, or flips a coin, or falls asleep, then surely that defendant's right to a fair trial would [also] be aggrieved." *Benally*, 546 F.3d at 1241. "Indeed, it is hard to see why, under this theory, *Tanner* should not have been decided the other way." *Id.*

There are many constitutionally valid methods of balancing the policy concerns that animate no-impeachment rules. *Cf. id.* at 1238 ("Perhaps it would be a good idea to amend Rule 606(b) to allow testimony revealing racial bias in jury deliberations ...."). Colorado's version of the no-impeachment rule—like the federal version—represents an acceptable policy decision. Colorado believes that a strict rule will best serve vital interests such as full and frank discussion, finality of verdicts, and preventing juror harassment. At the same time, Colorado permits extensive voir dire, including voir dire on questions of racial bias; is strongly committed to the fair cross-section requirement for choosing jury venire members; and requires twelve jurors to arrive at a unanimous verdict. Against the backdrop of these Sixth Amendment safeguards, Colorado's decision to adhere to the carefully considered policy choices reflected in the text of Rule 606(b) does not violate the Constitution.

CONCLUSION

The opinion of the Colorado Supreme Court should be affirmed.

Respectfully submitted,

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